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Office of Policy | Legal Education and Research Services Division

Policy & Case Law Bulletin
October 5, 2018

Federal Agencies

DOJ

- BIA Issues Decision in Matter of Velasquez-Rios — EOIR

  27 I&N Dec. 470 (BIA 2018)

  The amendment to section 18.5 of the California Penal Code, which retroactively lowered the maximum possible sentence that could have been imposed for an alien's State offense from 365 days to 364 days, does not affect the applicability of section 237(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i)(II) (2012), to a past conviction for a crime involving moral turpitude "for which a sentence of one year or longer may be imposed."

- Virtual Law Library Weekly Update — EOIR

  This update includes resources recently added to EOIR's internal or external Virtual Law Library, such as Federal Register Notices, country conditions information, and links to recently-updated immigration law publications.

DHS

- USCIS Provides Guidance for Implementing New Law Related to Foreign Workers on Guam, Northern Mariana Islands

  On October 1, 2018, USCIS issued a policy memorandum (PM) that provides "guidance on the implementation of section 1045 of the National Defense Authorization Act for Fiscal Year 2019, which allows certain H-2B workers on Guam and in the Commonwealth of the Northern Mariana Islands to qualify for an exemption to the 'temporary need' requirement if they begin employment on or before Dec. 30, 2023."

- F-1 "Cap-gap" Status and Work Authorization Extension Only Valid Through Sept. 30

  "F-1 students who have an H-1B petition that remains pending on Oct. 1, 2018, risk accruing unlawful presence if they continue to work on or after Oct. 1 (unless otherwise

authorized to continue employment), as their 'cap-gap' work authorization is only valid through Sept. 30. Due to increased demand for immigration benefits, resulting in higher caseloads as well as a significant surge in premium processing requests, USCIS may not be able to adjudicate H-1B change of status petitions for all F-1 students by Oct. 1."

DOS

- DOS Updates 9 FAM

  DOS made updates to 9 FAM, including to section 602.2, with clarifying guidance for Consular Officers other government agencies; section 402.3(U), revising guidance related to same-sex domestic partners to require, with limited exceptions, a valid marriage to qualify as immediate family for certain visas; section 504.10, revising FGM/C provisions consistent with the latest list of countries for concern for FGM/C, and FGM/C Fact Sheet posting and distribution requirements; section 602.1, revising to clarify 9 FAM 602.1-3 content pertaining to unethical intermediaries other than attorneys and U.S. agents; and section 305.1, adding a reference to INA section 212(a)(3)(A)(iii).

Third Circuit

- United States v. Abdullah

  No. 18-1082, 2018 WL 4702225 (3d Cir. Oct. 2, 2018) (Crime of Violence)

  The Third Circuit affirmed the district court's decision to sentence Abdullah as a career offender under U.S.S.G. § 4B1.1 (applying U.S.S.G. § 4B1.2(a)(1) ("force clause" analogous to 18. U.S.C. § 16(a))), based in part on Abdullah's 2015 conviction for third-degree aggravated assault with a deadly weapon in violation of N.J. Stat. Ann. § 2C:12-1(b)(2). The Court held that the New Jersey aggravated assault statute, § 2C:12-1(b), is divisible on its face because it proscribes three alternative degrees of conduct, each subject to different maximum sentences, and that the statute is further divisible into a number of different third-degree aggravated assault offenses. Resorting to the modified categorical approach, the court determined that the specific subsection under which Abdullah was convicted, § 2C:12-1(b)(2), is a crime of violence because it inherently involves an element of physical force.

- Friday v. Attorney Gen. of the United States

  No. 17-3790, 2018 WL 4677557 (3d Cir. Sept. 28, 2018) (unpublished) (Aggravated Felony; Fraud)

  The Third Circuit denied the PFR, upholding the Board's determination that Friday's conviction for aiding and assisting in the preparation and filing of materially false tax returns, in violation of 26 U.S.C. § 7206(2), is an aggravated felony as defined under section 101(a)(43)(M)(i) of the Act. While recognizing the lower preponderance standard governing the determination of the loss amount for sentencing and restitution, the court followed the Supreme Court's decision in Nijhawan v. Holder, 557 U.S. 29 (2009) to find that Friday's agreement to $145,156 of restitution was clear and convincing evidence that the actual loss stemming from his counts of conviction was more than $10,000 as required under section 101(a)(43)(M)(i).

Fifth Circuit

- United States v. Zapata-Cortinas

  No. SA-18-CR-00343-OLG, 2018 WL 4770868 (W.D. Tex. Oct. 2, 2018) (unpublished) (Notice to Appear; Jurisdiction)

  The district court dismissed Zapata-Cortinas's indictment, which alleged that he illegally reentered the United States in violation of section 276(a) of the Act (after having been previously removed from the United States). The court determined that Zapata-Cortinas's

prior removal to Mexico in February 2010 cannot be the basis for the charge against him because the removal order is void. The court concluded under Pereira v. Sessions, 138 S. Ct. 2105 (2018) that an NTA must contain the removal hearing's time and date in order to vest the immigration court with jurisdiction over an alien's removal proceeding. Because the NTA provided to Zapata-Cortinas did not contain the time and date of his prior removal hearing, the court found that it did not constitute a valid charging document, and therefore the immigration court lacked jurisdiction to remove Zapata-Cortinas. The court further determined that Zapata-Cortinas's indictment is also subject to dismissal because he satisfies the three requirements necessary to assert a collateral due process challenge to his removal order under section 276(d) of the Act.

Eighth Circuit

- United States v. Schneider

  No. 17-3034, 2018 WL 4653433 (8th Cir. Sept. 28, 2018) (Crime of Violence)

  The Eighth Circuit vacated the district court's sentence, holding that Schneider's 2012 aggravated-assault conviction in violation of N.D. Cent. Code Ann. § 12.1-17-02(1) is not a crime of violence under U.S.S.G. § 4B1.2(a)(1) ("force clause" analogous to 18. U.S.C. § 16(a)) or U.S.S.G. § 4B1.2(a)(2) ("enumerated-offenses clause"). The court determined that the statute of conviction is divisible because depending on the subsection at issue, the jury must find a distinct set of elements. Applying the modified categorical approach, the court could not determine whether Schneider pled guilty under subsection (a) or subsection (c). Based on controlling precedent in United States v. Ossana, 638 F.3d 895 (8th. Cir. 2011), the court held that a conviction under subsection (a) is not a crime of violence under the "force clause" because it includes reckless driving. The court found it unnecessary to analyze subsection (c).

Ninth Circuit

- Ramos v. Nielsen

  No. 18-CV-01554-EMC, 2018 WL 4778285 (N.D. Cal. Oct. 3, 2018) (unpublished) (Temporary Protected Status)

  The district court granted the plaintiffs' motion for a preliminary injunction, enjoining the government from implementing or enforcing the decisions of the Secretary of the DHS to terminate TPS designations for four countries: Haiti, Sudan, Nicaragua, and El Salvador pending a final resolution of the case on the merits. The court determined that the "balance of hardships . . . tips sharply in favor of TPS beneficiaries and their families. And Plaintiffs have made substantial showing on the merits of their claims, both on the facts and the law."

- Saravia v. Sessions

  No. 18-15114, 2018 WL 4689978 (9th Cir. Oct. 1, 2018) (TVPRA; Flores Settlement; Juvenile Detention)

  The Ninth Circuit affirmed, holding that the district court did not abuse its discretion in granting the minor plaintiffs' preliminary injunction, requiring a prompt hearing before a neutral decision maker in which the government must show that changed circumstances justified the minors' detention. This case involves noncitizen minor plaintiffs who entered the United States unaccompanied by a parent or guardian and were placed in the custody of the United States Office of Refugee Resettlement ("ORR"). ORR subsequently released the minors to a parent or sponsor after concluding that each minor was not dangerous to himself/herself or the community, nor a flight risk. In 2017, the government arrested the minors because of alleged gang membership and transferred them to secure juvenile detention facilities. In disagreeing with the government's arguments, the circuit court

concluded that 1) the preliminary injunction is consistent with the Trafficking Victims Protection Reauthorization Act (TVPRA) and the settlement agreement under Flores v. Sessions, 862 F.3d 863 (9th Cir. 2017), and 2) the district court did not abuse its discretion by finding that the existing procedural protections available to the minors under the TVPRA and the Flores settlement are inadequate to protect against the risk of minors being erroneously taken away from their sponsors.

Tenth Circuit

- United States v. Munoz-Alvarado

  No. CR-18-171-C, 2018 WL 4762134 (W.D. Okla. Oct. 2, 2018) (unpublished) (Notice to Appear)

  The district court denied Munoz-Alvarado's Motion to Dismiss Indictment, finding that the underlying premise for the motion, the alleged invalidity of the NTA, does not provide him entitlement to relief. The Court first explained that because Munoz-Alvarado appeared at his hearing, "[t]his fact alone is sufficient to overcome the deficiencies noted by the Supreme Court in Pereira." Alternatively, the Court indicated that Tenth Circuit precedent in United States v. Adame-Orozco, 607 F.3d 647 (10th Cir. 2010) precludes Munoz-Alvarado's challenge because he is unable to meet the requirements under section 276(d) of the Act to collaterally attack his deportation order. Finally, the Court noted that Munoz-Alvarado's motion seeks to impermissibly broaden the narrow holding of Pereira v. Sessions, 138 S. Ct. 2105 (2018).